

THE HONORABLE BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

Jo Anna Lang, PR of the estate Dick Lang, Wife  
and Husband, adoptive parents of C.L., a minor  
child and R.L., a minor child, Jo Anna Lang,  
guardian ad litem, for C.L. and R.L.,,

Plaintiffs,

v.

STATE OF WASHINGTON, DEPARTMENT  
OF SOCIAL AND HEALTH SERVICES,  
(DSHS) CHILD PROTECTIVE SERVICES,  
(CPS), Kaytena Gonzalez, individually and  
MARK AUSTIN GONZALEZ and as a marital  
community, Pamela Williams, individually, and  
Alan Robert Evans individually and as a marital  
community, Jennifer White and John DOE  
White individually and as a marital community,  
Laura Caruso, John Doe Caruso, individually  
and as a marital community; Sarah Coshow, and  
JOHN DOE Coshow, individually and as a  
marital community, Janelle E. Redmond and  
JOHN DOE Redmond, individually and as a  
marital community, Larraine Martinez, and  
JOHN DOE Martinez, individually and as a  
marital community, Beth A. Kutzero, and JOHN  
DOE Kutzero, individually and GLENN T.

DEFENDANTS KIMBERLEY COPELAND,  
MD, AND LEGACY SALMON CREEK  
MEDICAL CENTER'S RESPONSE TO [DKT.  
33] PLAINTIFF'S CROSS-MOTION AND  
REPLY IN SUPPORT OF [DKT. 30] MOTION  
TO DISMISS UNDER FRCP 12(b)(6) - 1

Case No.: 3:20-cv-05057

DEFENDANTS KIMBERLEY COPELAND,  
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MEDICAL CENTER'S RESPONSE TO  
[DKT. 33] PLAINTIFF'S CROSS-MOTION  
AND REPLY IN SUPPORT OF [DKT. 30]  
MOTION TO DISMISS UNDER FRCP  
12(b)(6)

**NOTED FOR CONSIDERATION:  
September 4, 2020**

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KUTZERA as a marital community, J. Aaron Merino, and JOHN DOE Merino; Jaimee Scheffler, individually and JOHN DOE Scheffler as a marital community, And, Office of the Attorney General, State Agency, Danial Hsieh, AAG  
 And,  
 Vancouver Police Department,  
 And,  
 Cowlitz County Sheriff's Department,  
 And,  
 Eimiko Murlin and Jeff Ian Murlin, individually and as a marital community, were foster parents of C.L.,  
 And,  
 Steve Vallembois, Jimmy Howard, Foster Parents for R.L., Individually,  
 And,  
 Court Appointed Special Advocate, CASA, its agent Kathy A. Shirilla,  
 And,  
 Kimberly Copeland, MD, Legacy Salmon Creek Medical Center,  
  
 Defendants.

# **1. Introduction**

Plaintiffs purport to have filed a "Cross-Motion" and "Response" to Defendants Dr. Kimberley Copeland's and Legacy Salmon Creek Medical Center's Motion to Dismiss for Failure to State a Claim ("Defendants' Motion") (Dkt. 30) on August 25, 2020. See Dkt. 33. However, Dr. Copeland's name or actions allegedly at issue are completely absent from Plaintiffs' brief. (Dkt. 33.) In actuality, Plaintiffs have failed to file anything in response to Defendant Dr. Copeland's Motion to Dismiss for Failure to State a Claim by Monday, August 31, 2020, the deadline established by local rule. LCR 7(d)(3).

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Nonetheless Plaintiff's own Cross-Motion for judgment based only on their own pleadings in an attempt to preemptively yield Rule 12(c) against Defendants, is also entirely improper and deficient with regard to Dr. Copeland. Again of note, nothing in a single docket to this suit has mentioned Legacy Salmon Creek Medical Center's ("Legacy Medical") alleged role in Plaintiffs' claim. Defendants nonetheless reply in support of their Motion to Dismiss (Dkt. 30).

**2. Plaintiffs Cannot Move for Judgment on the Pleadings Under FRCP 12(C).**

Procedurally, Plaintiffs cannot move for judgment on the pleadings under FRCP 12(c) because there have been no pleadings besides their own Complaint and First Amended Complaint (FAC). Motions under Rule 12(c) may be advanced only "[a]fter the pleadings are closed." FRCP 12(c). Pleadings are defined as complaints, third-party complaints, and answers to complaints, counterclaims, and cross-claims. FRCP 7(a)(1)-(7). By definition, a Rule 12(b)(6) motion is not a pleading. *Id.* For this reason, a plaintiff may not seek judgment on the pleadings before a defendant files an answer. *Poliquin v. Heckler*, 597 F. Supp. 1004, 1006 (D. Me. 1984) ("the pleadings are not closed until after the defendant has filed an answer," meaning plaintiff cannot invoke Rule 12(c) until then). A plaintiff has the option of seeking default against a defendant who "has failed to plead or otherwise defend," FRCP 55(a), but a Rule 12(b)(6) motion is an accepted way of "defend[ing]" that precludes a plaintiff from seeking default. *See Havensight Capital LLC v. Nike, Inc.*, 891 F.3d 1167, 1169 (9th Cir. 2018) (affirming Rule 11 sanctions against attorney who attempted to seek default multiple times after defendant filed Rule 12(b)(6) motion). As of today, no defendant has filed an answer pleading, meaning that Plaintiff is unable at this stage to seek judgment on the pleadings against any defendant.

Consequently, Plaintiff's brief (Dkt. 33) can only—at best—properly be treated as a response to Defendants' Motion to Dismiss. Even then, Plaintiff's brief does not function as a response to

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Defendants' Motion (Dkt. 30) in any way except by token reference to Docket 30 in the ECF filing website, and by a generalized reference to "defendants" in each heading of their Reply to City of Vancouver's Motion to Dismiss. (See Dkt. 33.) The caption and content of Plaintiff's brief (Dkt. 33) fail entirely to mention Dr. Copeland or any aspect of Dr. Copeland's purported role in this suit—let alone address the substance of Dr. Copeland's Motion or make any reference to the claim contained in the FAC.

**3. In a Properly Filed 12(C) Motion by a Plaintiff Against a Defendant, All Factual Allegations in All the Pleadings Must Be Treated as True, and Reasonable Inferences Must Be Drawn in Favor of the Defendant.**

In the hypothetical case that this were a properly filed 12(c) that mentioned Dr. Copeland in any way, Plaintiffs further misstate the law as applied in *Rose v. Chase Bank USA, NA*, 513 F.3d 1032 (9th Cir. 2008) by proposing that the Court is required to accept all allegations in Plaintiffs' Complaint as true for purposes of Plaintiffs' own motion. (Dkt. 33 at 4.) *Rose v. Chase Bank USA* merely applies the ordinary rule that a Plaintiff's well-pleaded allegations are accepted as true for purposes of a defendant's Rule 12(c) motion. *Rose*, 513 F.3d at 1036. This, as the Ninth Circuit has explained for years, is the same standard applied by a court when presented with a Rule 12(b)(6) motion. *Harris v. County of Orange*, 682 F.3d 1126, 1131 (9th Cir. 2012); *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). It is well established that a court confronted with a Rule 12(b)(6) or Rule 12(c) motion must accept the truth of all factual allegations and reasonable inferences in the pleadings and must construe those allegations and inferences in the light most favorable to the non-moving party. *Adams v. Johnson*, 355 F.3d 1179, 1181 (9th Cir. 2004). Thus, in a properly filed 12(c) motion by a

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1 plaintiff against a defendant, all factual allegations in *all* pleadings must be treated as true, and  
 2 reasonable inferences must be drawn in favor of the *defendant*.

3 On the other hand, in considering Plaintiffs' brief as a Reply to Defendants' Motion, conclusory  
 4 allegations of law and unwarranted inferences are insufficient to defeat Defendants' properly filed  
 5 Motion to Dismiss under Rule 12(b)(6). *Id.* With their scant token reference to Dkt. 30, and their use of  
 6 the word "defendants" in their Response headings, Plaintiffs have offered nothing more than conclusory  
 7 allegations of law and unwarranted inferences against Dr. Copeland, which means that Plaintiffs have  
 8 failed to defeat Defendants' Motion to Dismiss.

9  
 10 **4. Plaintiffs Have Implicitly Conceded That There is No Viable § 1983 Claim Against Dr.**  
 11 **Copeland.**

12 In surveying the facts contained in the Plaintiffs' FAC and attached exhibits, it is beyond  
 13 reasonable to infer that Dr. Copeland acted well within law and reason during her single examination of  
 14 R.L. Plaintiff has again provided no facts to even suggest that Dr. Copeland violated the Fourth  
 15 Amendment, substantive due process, or procedural due process rights of the Plaintiffs. Further, as  
 16 articulated by Co-Defendant City of Vancouver's Reply (Dkt. 36), Plaintiffs' FAC falls far short of  
 17 what is necessary to adequately allege an equal protection claim against Dr. Copeland. (Dkt. 36. 10:14-  
 18 19.) Simply because a recitation of the law shows that a constitutional violation can in theory be  
 19 alleged, does not mean that it has been properly alleged.

20 Nonetheless, assuming that Dr. Copeland violated Plaintiffs' constitutional rights (which she  
 21 did not), Plaintiffs have once again failed to show that Dr. Copeland was a state actor who acted under  
 22 color of law when she examined R.L. to provide an independent opinion. Plaintiffs have again failed to  
 23 show that Dr. Copeland was acting under color of law during an alleged violation of Plaintiff's

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1 constitutional rights. And even if Plaintiffs had shown that Dr. Copeland had violated Plaintiffs'  
 2 constitutional rights under color of law, Dr. Copeland would still be entitled to qualified immunity. (For  
 3 judicial economy, see Defendants' Motion in Dkt. 30 for legal authority and argument on Plaintiffs'  
 4 § 1983 assertions against Dr. Copeland and Legacy Medical, as Plaintiffs have provided no new  
 5 argument or facts on these issues.) Plaintiffs have completely failed to allege facts to establish these  
 6 essential elements of a claim under § 1983 and have thus implicitly conceded that there is no viable  
 7 § 1983 claim against Dr. Copeland or Legacy Medical.

8  
 9 **5. All State Law Actions in Plaintiffs' Claim Are Barred.**

10 As Co-Defendant City of Vancouver sufficiently stated in its own Reply (Dkt. 36), Plaintiffs do  
 11 not anywhere dispute that they failed to serve process on any defendant within 90 days of filing the  
 12 complaint. This means the statute of limitations continued to run on all state law claims long after  
 13 Plaintiffs filed their complaint on January 21, 2020. RCW 4.16.170. Plaintiffs' state law claims against  
 14 all defendants are time barred for the reasons stated in the City of Vancouver's Motion to Dismiss, and  
 15 Plaintiffs do not attempt to dispute this. Thus, as far as Plaintiffs now intend to retroactively include Dr.  
 16 Copeland as a defendant to their scattershot state causes of action, Plaintiffs' state actions are barred.

17  
 18 **6. Plaintiffs' federal claim against Dr. Copeland should be dismissed because Plaintiffs failed**  
 19 **to timely serve Defendant Dr. Copeland.**

20 Finally, Plaintiffs also do not in any way dispute that they failed to serve process on Dr.  
 21 Copeland within 90 days of filing as required by FRCP 4(m). Nor do Plaintiffs dispute having had  
 22 ample time to effect service. Thus, even if there were a viable § 1983 claim, Plaintiffs have implicitly  
 23

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conceded to this failure to properly serve Dr. Copeland. The federal claim against Dr. Copeland and Legacy should thus be dismissed pursuant to FRCP 12(b)(5).

#### **7. Conclusion**

By omitting completely to mention of Dr. Copeland or Legacy in Plaintiffs' brief (Dkt. 33), Plaintiffs have effectively failed to file anything in response to Defendant Dr. Copeland's Motion to Dismiss for Failure to State a Claim (Dkt. 30). Plaintiff's own motion for judgment on the pleadings under Rule 12(c), is neither proper nor applicable to Dr. Copeland. However, to the extent that Plaintiffs' brief is considered to be applicable to Dr. Copeland and Legacy, based solely on the token mention of "defendants," Plaintiffs have still failed entirely to address the FAC's failure to sufficiently allege that Dr. Copeland committed a constitutional violation as a state actor acting under color of law, or that qualified immunity would not have applied to her even if she had. Finally, no defendant was served within 90 days of filing, which represents a failure to file any state law actions against Dr. Copeland within the statute of limitations, and a failure to properly effect service of all federal actions against Dr. Copeland. The Court should grant Defendants' Motion and dismiss Dr. Copeland and Legacy from this case entirely.

DATED this 2nd day of September, 2020.

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**CERTIFICATE OF SERVICE**

I declare under penalty of perjury of the laws of the State of Washington that on the date below a copy of the foregoing *document* was forwarded for service upon counsel of record as follows:

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Signed at Seattle, Washington this 2<sup>nd</sup> day of September, 2020.

/s/Alisha P. Chand

Alisha Chand, Legal Assistant

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